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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN MILLSAP,

Defendant and Appellant.

B268402

(Los Angeles County
Super. Ct. No. MA063684)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Affirmed.

Nikoo N. Berenji, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

A jury found defendant and appellant Kevin Millsap guilty of possession of a controlled substance, marijuana, in a state prison. (Pen. Code, § 4573.6, subd. (a).)¹ In a bifurcated proceeding, the trial court found that Millsap had suffered two prior strike convictions and three prior convictions with a prison term. (§§ 667, subds. (b)-(j); 1170.12; 667.5.) The court thereafter sentenced Millsap to an aggregate term of six years in state prison comprised of the mid-term of three years for the drug offense, doubled for a prior strike. The court ordered sentence to run consecutively to the prison term that Millsap is already serving. (§ 1170, subd. (c)(1).) Millsap's appointed counsel on appeal filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Millsap has filed a letter brief. We affirm the judgment.

FACTS

The Drug Offense

In March 2013, Millsap was incarcerated in a state prison in Lancaster under a conviction by plea for second degree burglary and possession of stolen property. On March 14, 2013, Department of Corrections Officer Miguel Enriquez noticed Millsap reaching into his waistband area as he was walking from his housing cell to the prison yard. Officer Enriquez believed Millsap might be hiding contraband, and ordered him to go to the shower area. Millsap complied.

When they got to the shower area, Officer Enriquez first inspected the showers for any contraband that might have been left behind. There was "absolutely nothing on the floor in there." Officer Enriquez next directed Millsap to step inside the showers.

¹ All further undesignated section references are to the Penal Code.

After Millsap did so, Officer Enriquez directed him to take off his shirt and hand it over, and Millsap complied. Officer Enriquez then directed Millsap to take off his boxers and hand them over, and Millsap again complied. As Millsap was taking off his boxers, Officer Enriquez saw a piece of rolled up toilet paper fall from his waistband, and saw him step on the toilet paper, as though attempting to cover it.

Officer Enriquez ordered Millsap to hand him the piece of toilet paper, and Millsap did so. When Officer Enriquez unwrapped the toilet paper, he found four “plastic-wrapped bindles” containing a leafy green substance. At that point, Millsap stated that it was “just a little weed.” The substance found wrapped in the piece of toilet paper was later determined to be marijuana.

The Criminal Proceedings

In September 2014, the People filed an information charging Millsap with possession of contraband, marijuana, in a Department of Corrections facility. (§ 4573.6, subd. (a).)

Millsap, by the Public Defender’s Office, filed a motion for pretrial discovery of the personnel records of Officer Enriquez for any complaints related to falsification of evidence, or false arrests, perjury or making false reports. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).) The trial court conducted an in camera review, and ordered that certain information and records be disclosed to the defense from Officer Enriquez’s personnel file, subject to a protective order.

In March 2015, the People filed an amended information charging Millsap with possession of contraband, marijuana, in a department of corrections facility (count 1; § 4573.6, subd. (a)) and possession of drugs, marijuana, or alcohol in a department of

corrections facility (count 2; § 4573.8) Further, the amended information alleged that Millsap had suffered two prior strike convictions and (§§ 667, subds. (b)-(j); 1170.12), and three prior convictions with a prison term (§ 667.5 subd. (b)).

The trial court dismissed count 2 on the People’s motion, and bifurcated trial on the prior conviction allegations. The trial court denied Millsap’s motion to substitute his appointed counsel (see *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*))² and denied his ensuing motion to proceed as a self-represented litigant (see *Faretta v. California* (1975) 422 U.S. 806). The prosecution and defense then gave opening statements.

The prosecution presented evidence — primarily through the testimony of Officer Enriquez — establishing the facts summarized above. Millsap testified in his own defense. He denied that he had any marijuana on the day in question, and asserted that there was “debris” in the floor when he stepped inside the shower, that it “was dirty, was filthy or whatever.” The case was submitted to the jury for deliberations.

The jury submitted a question to the trial court asking about “testimony that officers brought drugs into the prison,” and whether this was “relevant to consider in this case.” The court provided a written answer to the jury’s question, instructing the jurors that they “must decide all questions of fact in this case from the evidence received [at] trial.”

The jury submitted a note to the trial court indicating that they were “deadlocked.” Further, the note stated: “Jur[or] # 2 complained that: [¶] Juror #1 made a statement at the

² We have reviewed the sealed reporter’s transcript of the *Marsden* hearing conducted outside the presence of the prosecutor.

beginning of deliberations that he was going to agree with the majority as he just wants to get back to work . . . [and] therefore believe[s] he is not fit to decide this issue.”

In response to the jury’s note, the trial court interviewed the jury foreperson, and Juror number 2 and Juror number 1. After confirming that Juror number 1 had in fact made a statement substantively in the form as asserted, the trial court decided, with the agreement of both the prosecutor and defense counsel, to excuse Juror number 1 and replace him with one of the alternate jurors. The court then instructed the reconstituted jury on the process for beginning jury deliberations anew.

On September 23, 2015, the jury sent another note to the trial court. This note read: “1. Juror #1 researched on his own last night on the internet to research the definition of ‘not guilty beyond reasonable doubt.’ [¶] 2. Juror #1 went into juror room restroom, secured piece of toilet paper to determine possible size/shape of tissue found in shower during search of defendant.”

In response to the jury’s note, the trial court interviewed the jury foreperson, and Juror number 1. After confirming that Juror number 1 had in fact committed the acts as asserted, the trial court heard from the lawyers. Millsap’s counsel requested a mistrial. The prosecutor asked the court to excuse Juror number 1, and to replace him with the last remaining alternate juror, but added that he believed the jury would still be able to decide the case based on the evidence and instructions. The court thereafter asked each of the jurors individually (numbers 2 through 12) whether they would be able to decide the case on the evidence and instructions, and each juror answered individually, “Yes.” After hearing from the jurors, the court asked Millsap’s counsel whether he wanted to be heard any further on the defense’s

motion for mistrial, and counsel indicated that he was “withdrawing” the motion. The court in turn replaced Juror number 1 with the alternate juror, and, shortly thereafter, instructed the reconstituted jury on the process for beginning jury deliberations anew.

Thereafter, the jury returned a verdict finding Millsap guilty as charged.

The trial court found the prior conviction allegations to be true, dismissed several of them, and sentenced Millsap as noted at the outset of this opinion.

DISCUSSION

I. *Wende* Review

We appointed counsel to represent Millsap on appeal. Appointed counsel filed an opening brief pursuant to *Wende*, *supra*, 25 Cal.3d 436, requesting independent review of the record on appeal for any arguable issues. We notified Millsap by letter that he could submit any claim, argument or issues that he wished our court to review. Millsap filed a letter which we discuss in the following paragraphs.

Millsap contends his drug conviction must be reversed based on ineffective assistance of counsel. Millsap asserts that his trial attorney (1) “failed to discuss trial defense strategies with [him];” (2) “failed to investigate the scene of the alleged crime;” (3) “never challenged” any part of the prosecution’s evidence “on any motions;” (4) “failed to use [any] witness to discredit [the] prosecutor’s witness testimony;” and (5) “never discussed any strategies [with him] as to the [jury] selection process.” Because the record on appeal does not evidence either the facts for Millsap’s assertions, and or the reasons for his trial counsel’s trial tactics and actions, we find his ineffective

assistance of counsel claim does not raise any arguable issues. (See, e.g., *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267 [where claims of ineffective assistance of counsel are based on matters that are outside the record on appeal, such claims are “often more appropriately litigated in a habeas corpus proceeding”].)

Next, Millsap contends his drug conviction must be reversed because there was “jury misconduct, . . . where outside investigation was done outside the scope of the courtroom.” Because the record on appeal shows that the trial court investigated and evaluated the matter of the juror who conducted the “toilet paper” experiment in the jury deliberation room (and also the matter of the juror’s outside research of the meaning of “reasonable doubt”), and excused the juror, we find Millsap’s juror misconduct claim does not raise any arguable issues. The record shows the trial court acted appropriately in excusing the wayward juror, and in inquiring of the remaining jurors whether they would still decide the case based only on the evidence presented at trial and on the court’s instructions on the law.

II. *Pitchess* Review

In the opening brief filed pursuant to *Wende*, Millsap’s appointed counsel on appeal asked our court to review the record independently to determine whether the trial court (1) conducted a proper *Pitchess* review in camera, and (2) correctly ruled on the reach of the defense’s motion for discovery of Officer Enriquez’s personnel file. Such review on appeal is proper under the procedures set forth in *People v. Mooc* (2001) 26 Cal.4th 1216.

We have reviewed Millsap’s *Pitchess* motion, the opposition to the *Pitchess* motion filed by the custodian of records of the Department of Corrections and Rehabilitation, and the transcript

of the in camera review. We conclude that the trial court properly conducted the *Pitchess* hearing, describing the nature of all complaints, if any, against Officer Enriquez. Further, we find the court did not abuse its discretion in ruling that discoverable evidence existed and needed to be disclosed. The record does not show that additional information should have been disclosed.

DISPOSITION

We have independently reviewed the record on appeal, and find that appointed counsel has fulfilled her duty, and that no arguable issues exist. (*Wende, supra*, 25 Cal.3d 436, *People v. Kelly* (2006) 40 Cal.4th 106.) The judgment is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

FLIER, J.